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Congress of the United States
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CHAIR, CONGRESSIONAL LGBTQ+
EQUALITY CAUCUS

June 15, 2022

Hon. Brian Schatz
United States Senate
722 Hart Senate Office Building
Washington, D.C. 20510

Hon. Ron Wyden
United States Senate
221 Dirksen Senate Office Building
Washington, D.C. 20510

Hon. Ben Ray Luján
United States Senate
498 Russell Senate Office Building
Washington, D.C. 20510

Hon. Tammy Baldwin
United States Senate
709 Hart Senate Office Building
Washington, D.C. 20510

Dear Senators Schatz, Wyden, Luján, and Baldwin:

I write in response to your letter raising concerns about the effect of the American Innovation and Choice Online Act (S. 2992, H.R. 3816) on the ability of social-media platforms to remove hate speech or misinformation from their platforms.¹ Although I take these concerns seriously, as the Chair of the Equality Caucus, the author of the Equality Act, and a Vice Chair of the Progressive Caucus I would never lead legislation that would “supercharge harmful content online.”² As such, I want to assure you that the American Innovation and Choice Online Act will not disturb current law related to content moderation or hinder content-moderation practices online. As you know, the relevant provision of the bill incorporates a harm-to-competition requirement that is consistent with current antitrust law, under which platforms regularly engage in content moderation. In addition, the Act preserves and enhances platforms’ existing defenses against claims related to content moderation. Nevertheless, I remain committed to doing what is necessary to strengthen and improve the bill, and I look forward to continuing to work with you to achieve that important goal.

¹ Brendan Bordelon, *Senate Dems Raise New Objection to Tech Antitrust Bill*, POLITICO PRO (June 15, 2022), <https://subscriber.politicopro.com/newsletter/2022/06/senate-dems-raise-new-objection-to-tech-antitrust-bill-00039709>.

² *Id.*

As you noted, Section 3(a)(3) of S. 2992 makes it unlawful for a covered-platform operator to “discriminate in the application or enforcement of the terms of service of the covered platform among similarly situated business users in a manner that would materially harm competition.” S. 2992 also limits enforcement of the Act to federal and state government antitrust enforcers. Thus, if a government enforcer attempted to enforce the Act in a manner that is inconsistent with current law applicable to content moderation, it would have to prove not merely that the platform applied its terms of service to moderate content, but also that it enforced the terms in a manner that was actually discriminatory and that would result in material harm to competition. This is a high evidentiary bar—and one that substantially increases the enforcer’s burden from the House companion, H.R. 3816.

Among other things, the Senate version adds the requirement that an enforcer must prove that the challenged conduct would materially harm competition. The antitrust concept of “harm to competition” exists under current law and means “harm, not just to a single competitor, but to the competitive process, *i.e.*, to competition itself.”³ Yet platforms engage in content moderation today. S. 2992 thus would not displace platforms’ existing content-moderation practices, nor would it raise barriers preventing platforms from making much-needed improvements to their content-moderation practices.

Moreover, *even if* a covered platform’s discriminatory application of its terms of service materially harmed competition, the Act preserves platforms’ content-moderation-related defenses under current law. Section 5 of S. 2992 states expressly that “[n]othing in this Act may be construed to limit . . . the application of any law.”

One such law is Section 230(c) of the Communications Decency Act.⁴ Under that provision, social-media platforms may not “be treated as the publisher or speaker of any information provided by another information content provider.”⁵ They also may not be held civilly liable on account of “any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.”⁶ Accordingly, as with other liability statutes enacted since the passage of Section 230, Section 230 provides “an affirmative defense to liability under [the Act] for . . . the narrow set of defendants and conduct to which Section 230 applies.”⁷ Another still-

³ *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 135 (1998).

⁴ 47 U.S.C. § 230(c).

⁵ *Id.* § 230(c)(1).

⁶ *Id.* § 230(c)(2).

⁷ *Gonzalez v. Google LLC*, 2 F.4th 871, 889 (9th Cir. 2021) (quoting *Force v. Facebook, Inc.*, 934 F.3d 53, 72 (2d Cir. 2019)); *see generally Marshall’s Locksmith Serv. Inc. v. Google, LLC*, 925 F.3d 1263 (D.C. Cir. 2019) (affirming dismissal of multiple claims, including Sherman Act Section 1 and 2 claims, under Section 230(c)(1)).

applicable law is the First Amendment to the U.S. Constitution, which the Act does not—and indeed, cannot—abrogate.⁸

On top of these existing protections, the Act provides express affirmative defenses that do not exist in current antitrust statutes—and S. 2992 significantly lowers the burden on defendants to prove those defenses from its House companion, H.R. 3816. Section 3(b) of S. 2992 provides that, *even if* a dominant platform’s content moderation were discriminatory and materially harmed competition, that content moderation would *not* be unlawful under the Act if it were reasonably necessary to prevent a violation of the law, protect user privacy or safety, or protect the security of the covered platform. Most content moderation is undertaken for these very purposes.

There are also practical and procedural protections that would make it difficult for a rogue enforcer to weaponize the Act against content moderation. Government enforcers are bound by constitutional, jurisdictional, and budgetary constraints limiting their ability to bring unmeritorious lawsuits against conduct subject to strong affirmative defenses. Even if an enforcer were to file such a lawsuit, the primary value of the lawsuit is typically an immediate injunction against the discriminatory application of the terms of service. For relief of that nature, however, Section 3(c)(6)(C)(ii)(II)(cc) of S. 2992 requires the enforcer to prove that the injunction would be in the public interest. In such circumstances, courts have had no difficulty balancing competition with safety and similar concerns to determine the public interest—and have concluded that a preliminary injunction should be denied, allowing platforms to enforce their content-moderation policies.⁹

I would also note that the misconception that the bill will weaken existing content-moderation practices has been advanced by the Big Tech companies and their allies as a last-ditch effort to stall the progress of the legislation. Similar arguments have been made about prior drafts of the bill, irrespective of its text, and they do not reflect the significant compromises in the current text of the bill.¹⁰ To the contrary, numerous public-interest organizations groups—including Public Knowledge and the Center for American Progress—have noted that this legislation will not hinder the ability of dominant social media platforms to moderate content

⁸ As the Eleventh Circuit recently held concerning a state law that limited content moderation on social media: “[I]t is substantially likely that social-media companies—even the biggest ones—are ‘private actors’ whose rights the First Amendment protects” and “that their so-called ‘content-moderation’ decisions constitute protected exercises of editorial judgment.” *NetChoice, LLC v. Att’y Gen., Fla.*, 2022 WL 1613291, at *1 (11th Cir. 2022) (to be reported at 34 F.4th 1196). In reaching its holding, the court of appeals relied on decisions such as *Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1921 (2019), and *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

⁹ See, e.g., *Parler LLC v. Amazon Web Services, Inc.*, 514 F. Supp. 3d 1261, 1270 (W.D. Wash. 2021) (rejecting “any suggestion that the public interest favors requiring AWS to host . . . incendiary speech.”).

¹⁰ See, e.g., *Cicilline’s Free-Rider Bill Is a Disaster for Consumers*, Comput. & Commc’ns Indus. Ass’n (CCIA): Springboard (Aug. 6, 2021), <https://springboardccia.com/2021/08/06/cicillines-free-rider-bill-is-a-disaster-for-consumers/>.

online.¹¹ And to be clear, Facebook and other dominant social-media platforms did far too little to prevent an attack on the Capitol on January 6th, as thousands of pages of their internal documents show.¹²

Finally, your proposed language for the Act—although well intentioned—is already reflected in the base text of the bill. As detailed above, among other things, section 5 of S. 2992 preserves the continued applicability of current laws, including 47 U.S.C. § 230(c), that protect social-media platforms from liability for good-faith content moderation. Although I agree that legislation is necessary to address concerns with misinformation and content-moderation practices by dominant social-media platforms, I have consistently said that this legislation is not the avenue for doing so. As such, this legislation is narrowly tailored to address specific anticompetitive practices by dominant technology firms online. And as the Department of Justice has noted, it is a complement to and clarification of the antitrust laws as they apply to digital markets.¹³ As such, it does not supersede other laws.

However, as I noted at the outset, I take your concerns seriously, and I am committed to continue working with you to strengthen and improve this bill. As I have made clear for nearly a year since this legislation was advanced out of the House Judiciary Committee, I am firmly committed to considering reasonable suggestions that are not intended to alter the core principles of this legislation: to protect consumers and small businesses from anticompetitive behavior by monopolies online. With that in mind, I look forward to continuing our work together to address your concerns as the bill advances through the House and Senate.

Sincerely,



David N. Cicilline
Chair
Subcommittee on Antitrust, Commercial, and
Administrative Law
Committee on the Judiciary
U.S. House of Representatives

¹¹ See, e.g., Adam Conner & Erin Simpson, *Evaluating 2 Tech Antitrust Bills to Restore Competition Online*, CTR. FOR AM. PROGRESS (June 2, 2022), <https://www.americanprogress.org/article/evaluating-2-tech-antitrust-bills-to-restore-competition-online/>.

¹² Donie O’Sullivan, Tara Subramaniam, & Clare Duffy, *Not Stopping “Stop the Steal:” Facebook Papers Paint Damning Picture of Company’s Role in the Insurrection*, CNN BUS. (Oct. 24, 2021), <https://www.cnn.com/2021/10/22/business/january-6-insurrection-facebook-papers/index.html>.

¹³ Letter from Peter Hyun, Acting Assistant Att’y Gen., U.S. Dep’t of Justice, to Hon. Jerrold Nadler, Chair, H. Comm. on the Judiciary, Hon. Jim Jordan, Ranking Member, H. Comm. on the Judiciary, Hon. David Cicilline, Chair, Subcomm. on Antitrust, Com., & Admin. L. of the H. Comm. on the Judiciary, & Hon. Ken Buck, Ranking Member, Subcomm. on Antitrust, Com., & Admin. L. of the H. Comm. on the Judiciary (Mar. 28, 2022), <https://www.justice.gov/ola/page/file/1488741/download>.